No. 21831

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NEWTON GARDNER, JR.,

Appellant,

vs.

WILLIAM E. ST. JOHN, etc., *et al.*,

Appellees.

BRIEF OF APPELLEES.

BALL, HUNT, HART and BROWN,
JOSEPH D. MULLENDER, JR.,
120 Linden Avenue,
Long Beach, Calif. 90802,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEES.

Statement of Jurisdiction.

In this brief we will refer to the appellant as plaintiff, and to the appellees as defendants.

Plaintiff's complaint, which was filed in the District Court for the Southern District of California, Central Division (now the Central District), alleges that it is an action for violation of civil rights, and that the District Court has jurisdiction pursuant to 42 U.S.C.A. 1983 and 1985; and 28 U.S.C.A. 1331 and 1343(3) and (4). [Clk. Tr. 3.]

On motion of the defendants [Clk. Tr. 32], the district court dismissed the complaint for failure to state a claim upon which relief can be granted. [Clk. Tr. 71.]

The plaintiff appealed [Clk. Tr. 87], and this court has jurisdiction of the appeal pursuant to 28 U.S.C. 1291.

The third cause of action, which is the last, is apparently intended to show how the plaintiff was prejudiced by the failure to furnish him with a transcript. Therein it is alleged that the plaintiff was delayed forty-five months in seeking a collateral remedy, and that the appellate court in denying relief made reference to the fact that he had delayed seeking such remedy. [Clk. Tr. 11-12.] The plaintiff then says that the same facts complained of in this case were presented to the California court. The complaint alleges: "The record in that court did show that the plaintiff presented the reasons for the delays and among those was the act of the defendants in their failure to provide transcripts as ordered by the court." [Clk. Tr. 12, lines 11-14.]

In addition to the complaint, the court may take judicial notice of the opinion of the California District Court of Appeal in *People v. Gardner,* 4 Crim. No. 2153. This opinion is reproduced in the record [Clk. Tr. 37-39], and it is referred to in the plaintiff's complaint. [Clk. Tr. 12, lines 14-15.] The opinion of the District Court of Appeal shows, among other things, that the plaintiff could not have been deprived of a transcript of his trial because he pled guilty and had no trial, and that the basis of the court's opinion in denying post-conviction relief was that the federal standards upon which the plaintiff relied were not applicable at the time of his conviction and would not be given retroactive application. [Clk. Tr. 37-39.]

Summary of Argument.

1. The defendants, being quasi-judicial officers, are immune from suits for damages under the civil rights statutes. The only exception to the immunity of a

judge, prosecutor, clerk or other judicial or quasi-judicial officer is when there is a clear absence of all jurisdiction over the subject matter. It is not sufficient to allege that the defendant acted in excess of his jurisdiction.

2. The complaint shows on its face that the plaintiff's claim is barred under the doctrines of *res judicata* and collateral estoppel. The complaint alleges that the same alleged wrongful acts of the defendants were presented to the California court in a petition for post-conviction relief, that the California court denied relief, and that the California judgment is final.

3. The opinion of the California District Court of Appeal shows that the essential allegations of the complaint are not true. The complaint alleges that the plaintiff was deprived of a transcript of his trial. The opinion of the Court of Appeals shows that the plaintiff pled guilty and did not have a trial. The complaint alleges that the failure to furnish a transcript delayed his petition for post-conviction relief and that this was the basis for denying relief. The opinion of the District Court of Appeals shows that the basis of the decision was that the federal standards upon which the plaintiff claimed to be entitled to relief were not applicable at the time of his conviction and would not be given retroactive application.

4. Even if the allegations of the complaint are accepted at face value, they do not state a claim for relief. There are no facts alleged and none can be inferred to explain how the plaintiff was or could have been damaged by the failure to furnish him with a transcript.

ARGUMENT.

I.

The Defendants Are Immune From Suits for Damages Under the Civil Rights Statutes.

The defendants are the District Attorney of Orange County, the County Clerk, a Deputy District Attorney and a Deputy County Clerk. As such, they are quasi-judicial officers and are immune from suits for damages based on their acts performed under the scope and authority of their offices, unless there is a clear absence of all jurisdiction over the subject matter.

In *Sires v. Cole* (9th Cir. 1963), 320 F. 2d 877, the plaintiff sued a judge of Kittitas County, Washington, the county prosecutor, a deputy prosecutor, and the county. The complaint sought damages and alleged that the defendants had tricked the plaintiff into entering a plea of guilty to a misdemeanor and then sentenced him to a term in prison as if he had been guilty of a felony. The district court dismissed the complaint for various reasons, but not on a ground that the defendants were immune from suit for damages. The district court also found that the facts alleged by the plaintiff were true in that it issued a writ of habeas corpus. On appeal from the order dismissing the complaint, this court said: "We need not decide whether any of the reasons stated by the district court for dismissing the action have merit because there are reasons for dismissal, manifest on the face of the complaint, which in any event require us to affirm." (320 F. 2d at 879.) The court then held that counties, judges and prosecutors are im-

mune from suits for damages under the Civil Rights Act. A judge has such immunity without regard to his motives and notwithstanding that his acts may have been performed in excess of jurisdiction, provided there is not a clear absence of all jurisdiction over the subject matter. (320 F. 2d at 879.) Prosecutors have the same immunity as judges:

> "The remaining defendants are the prosecuting attorney and a deputy prosecuting attorney of Kittitas County. A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge. . . . For this reason the action was properly dismissed as to these remaining defendants." (320 F. 2d at 880, citations omitted.)

In *Harmon v. Superior Court* (9th Cir. 1964), 329 F. 2d 154, the County Clerk of Los Angeles County was included as one of the defendants, together with certain other County officials. In affirming an order dismissing the action as to all defendants, the court said:

> "The acts of the 'prosecuting defendants' complained of were 'quasi-judicial' acts done by them in the exercise of their quasi-judicial functions, and under a similar, if not a same, immunity." (329 F. 2d at 155.)

In *Agnew v. Moody* (9th Cir. 1964), 330 F. 2d 868, the plaintiff sued police officers, deputy city attorneys, and a judge of the Los Angeles Municipal Court, together with his reporter, clerk and bailiff. The judge's clerk would, of course, be a deputy clerk. The

court held that the judge was immune. It was not necessary to reach the question of immunity as to the clerk, bailiff and reporter as they "were too remote and inconsequential to form the basis of a claim", but the court makes this statement:

> "Appellant has not contended that immunity, if available to the Judge, did not extend to his clerk, bailiff, and reporter. The Supreme Court has said, 'a like immunity extends to other officers of government whose duties are related to the judicial process' . . ., and the duties of clerks, bailiffs, and reporters clearly are." [330 F. 2d at 870, citations omitted.)

In the case now under consideration, the complaint affirmatively shows that each of the defendants is a quasi-judicial officer and thus entitled to immunity from suits for damages. There is no allegation that there was a clear absence of all jurisdiction over the subject matter. The complaint does allege "excess of jurisdiction", but that sort of allegation has been expressly held to be insufficient. (*Sires v. Cole* (9th Cir. 1963), 320 F. 2d 877, 879.) The very nature of the plaintiff's claim shows that there was jurisdiction. The plaintiff's alleged grievance is that these defendants, while acting "under the scope and authority of their offices", disobeyed an order of court with respect to furnishing the plaintiff with a transcript. Assuming that is true, the most that can be said is that they exceeded their authority in respect of a matter within their jurisdiction, *i.e.*, within the scope and authority of their offices.

II.

The Plaintiff's Claim Is Barred Under the Doctrines of Res Judicata and Collateral Estoppel.

The complaint specifically alleges that the same facts which form the basis of this action were presented to the California District Court of Appeal in the prior criminal proceeding, that the plaintiff's claim for relief in that proceeding was denied, and that the judgment is final. [Clk. Tr. 12, lines 7-25.]

Under the doctrine of *res judicata* a party is precluded from litigating the same claim over again. (*Bernhard v. Bank of America* (1942), 19 Cal. 2d 807, 813 [122 P. 2d 892].) If the subsequent lawsuit is not based on the identical cause of action but involves the same facts, the plaintiff is collaterally estopped from re-litigating those facts. (*Klinell v. Shirey* (1963), 223 Cal. App. 2d 239, 243-244 [35 Cal. Rptr. 901].) The doctrine of collaterial estoppel is applicable to a civil action involving facts adjudicated in a prior criminal proceeding. (*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.* (1962), 58 Cal. 2d 601, 604 [25 Cal. Rptr. 559, 375 P. 2d 439].)

These principles have, in effect, been applied to suits for damages under the Civil Rights Act. In *Curtis v. Tower* (6th Cir. 1959), 262 F. 2d 166, the plaintiff had been convicted, and two petitions for habeas corpus had been denied. He then sued for damages under the civil rights statutes. In affirming a dismissal of the action, the court said:

> "The judgment of the State Court, if not vacated, corrected, or amended by the state reviewing courts, or set aside by the Federal Court for

invasion of a federal constitutional right, must be accepted by us as in full force and effect unless it is vacated by a state or federal court for some invasion of federal constitutional right. No such adjudication is perceived of record or urged in brief or argument and there has been no appeal from the several judgments overruling petitions for writs of habeas corpus in the District Court. If the State Court judgment is valid, the appellant has not been injured and his complaint in the District Court sets forth no cause of action under the Civil Rights Act." (262 F. 2d at 167.)

III.

The Opinion of the California District Court of Appeal Shows That the Essential Allegations of the Complaint Are Not True and That No Claim for Relief Is or Can Be Stated.

A motion to dismiss normally admits the allegations of the complaint. But as this court held in *Interstate Natural Gas Co. v. So. Calif. Gas Co.* (9th Cir. 1953), 209 F. 2d 380, at 384: "A motion to dismiss pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. admits all well-pleaded facts, but does not admit facts which the court will judicially notice as not being true nor facts which are revealed to be unfounded by documents included in the pleadings or introduced in support of the motion." The fact of which the court took judicial notice in the *Interstate Natural Gas* case was a contract referred to in the complaint but not attached to it, which was filed with the court in support of the motion to dismiss.

The federal courts, of course, take judicial notice of the decisions of the state courts. (*Odom v. Langston*

(D.C.W.D. Mo. 1948), 75 F. Supp. 651, 653; *LaBelle v. Hancock* (D.C.N.H. 1955), 134 F. Supp. 273, 275.) A copy of the opinion of the California District Court of Appeal in *People v. Gardner,* 4 Crim. No. 2153, was filed in support of the motion to dismiss in this case, and that opinion is also specifically referred to in the plaintiff's complaint. [Clk. Tr. 12, lines 14-15.]

The opinion of the California District Court of Appeal is significant in two respects when compared to the plaintiff's complaint. The plaintiff claims in his complaint that he was denied a transcript of his trial. [Clk. Tr. 6, lines 1-10; Clk. Tr. 10, lines 16-23.] The opinion shows, however, that the plaintiff pled guilty and consequently there was no trial. [Clk. Tr. 37.] Nevertheless, let us assume that the plaintiff was denied some sort of a transcript. The plaintiff claims that the result of this was that he was delayed forty-five months in petitioning for post-conviction relief, and that this delay was the cause of the denial of such relief. [Clk. Tr. 11-13.] In the first place, it does not follow, particularly in view of the allegations of the complaint, that the failure to furnish the transcript was the cause of the delay in filing the petition for post-conviction relief. The complaint does not allege that the plaintiff finally got the transcript and then filed the petition. The allegation is that he filed the petition after learning that he had been denied the transcript. [Clk. Tr. 9-10.] But again, assume further that the failure to furnish the transcript was the cause of the delay. The opinion of the District Court of Appeal shows that this was not the reason for denying the petition. The plaintiff was claiming that illegally-

obtained evidence, within the meaning of *Escobedo v. Illinois* (1964), 378 U.S. 478 [12 L. Ed. 2d 977, 84 S. Ct. 1758]; and *Mape v. Ohio* (1961), 367 U.S. 643 [6 L. Ed. 2d 1081, 81 S. Ct. 1684], had been used against him. The basis of the decision of the District Court of Appeal in denying post-conviction relief was that these cases were decided by the United States Supreme Court after the plaintiff's conviction and would not be applied retroactively. [Clk. Tr. 39.]

IV.

The Complaint Is Deficient Because It Fails to Allege Any Facts to Show How the Plaintiff Was or Could Have Been Damaged by Failure to Furnish Him With a Transcript.

The plaintiff has cited one case, *Washington v. Official Court Stenographer* (D.C. E.D. Pa. 1966), 251 F. Supp. 945, which held that a cause of action was stated against the reporter for failure to furnish a transcript when two judges had made orders that the transcript be provided. We submit that the *Washington* case is distinguishable, and in any event should not be followed in this Circuit.

The *Washington* case is distinguishable in this respect. Therein, as here, the plaintiff alleged only the conclusion that he needed the transcript to prepare a petition for post-conviction relief. The court held that this in itself was not a sufficient allegation, but that a need for the transcript could be inferred from the allegation that two judges had ordered the transcript. (251 F. Supp. at 947.) Here the facts are not the

same. The complaint alleges that when the plaintiff renewed his motion for procurement of the record, his second motion was denied. [Clk. Tr. 9, lines 8-16.] Furthermore, the opinion of the District Court of Appeal shows that the alleged failure to furnish the transcript, indeed the transcript itself, was immaterial. The only claim the plaintiff made in that proceeding was that certain Supreme Court cases decided after his conviction invalidated his conviction, and the court said it would not apply those cases retroactively. [Clk. Tr. 39.]

The *Washington* case also holds that actual damage is not essential to a cause of action under the Civil Rights Act, and that merely nominal and punitive damages may be recovered. (251 F. Supp. at 947.) This general statement is acceptable in some situations, but we submit that it was incorrectly applied by the Pennsylvania District Court in the *Washington* case. The only case cited for this proposition in the *Washington* case is *Basista v. Weir* (3rd Cir. 1965), 340 F. 2d 74. *Basista v. Weir* involved an aggravated and unjustified assault and battery in connection with an arrest. The sole point at issue on damages was whether the plaintiff's counsel had waived general compensatory damages at pretrial in stating that no special damages were claimed, such as medical and wage loss. (340 F. 2d at 84-88.) Having been unjustifiably beaten on the head with a billy club (340 F. 2d at 77), the plaintiff had obviously sustained general compensatory damages as is true in any personal injury case. We submit that the situation is different when the alleged deprivation of rights